IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7883 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MUKESH @ GUNIYO BHIKHUSINH CHAUHAN (RAJPUT)

Versus

COMMISSIONER OF POLICE

Appearance:

MR CHETAN B RAVAL for Petitioner

MR UDAY BHATT Ld.AGP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision: 10/10/2000

ORAL JUDGEMENT

1. By filing this writ petition under Article 226 of the Constitution of India, the petitioner-detenu has challenged the legality and validity of the order of detention dated 3.5.2000 passed by respondent no. 1 in exercise of his powers conferred upon him under sec. 3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985 (for short 'the Act').

2. As per the papers of grounds of detention, the petitioner-detenu is the "bootlegger" within the meaning

of section 2(b) of the Act and his activities are prejudicial to the maintenance of public order.

3. Before passing an order of detention for arriving at his subjective satisfaction, the detaining authority has placed reliance on 8 Prohibition Cases referred to in grounds of detention. Out of 8 prohibition cases, six prohibition cases have been registered in Prohibition Station (Eastern Zone) and two prohibition cases have been lodged in Amraiwadi Police Station. Out of 8 cases, two cases at sr. no. 2 and 3 are pending in the court awaiting trial. While rest of the six cases are pending with Investigating Officer for investigation. The detaining authority has also placed reliance on the statements of two anonymous witnesses whose identity has not been disclosed by claiming privilege under sec. 9(2) of the Act.As per the papers, such statements were recorded on 28.4.2000 and 30.4.2000 respectively. That two statements were verified by the detaining authority on 2.5.2000 and on the next day i.e. on 3.5.2000, he passed an order of the detention, which is challenged in this writ petition.

4. Though rule has been served upon each of the respondents, they have not filed affidavit-in -reply, in reply to main petition, and thus, they have not controverted the grounds of attack to challenge the order of detention.

5. Mr CB Raval learned advocate for the petitioner has argued that the detaining authority has claimed privilege under sec. 9(2) of the Act which is not in accordance with law. He has cited an authority of Kalidas Chandubhai Kahar vs. State of Gujarat & Ors. reported in 1993(2) GLR 1659, wherein it has been held that the detaining authority is expected to do some exercise before actually exercising the privilege under sec. 9(2) of the Act. It has been further held that at the time of exercising the privilege under sec. 9(2) of the Act, balance is required to be struck between the public interest on the one hand and the right of the detenu to make a representation under Article 22(5) of the Constitution on the other. If the statements of the witnesses are to be relied on, they must be genuine statements of the real persons. The detenu would like to verify as to whether these persons are fictitious persons or not and/or whether their statements are bogus statements or not ? Unless the detenu knows the names and addresses of the persons who have given the statements, he cannot verify the aforesaid facts and if the names and addresses along with the contents of the

statements are supplied to the detenu, he can have full opportunity to verify the position and make an effective representation on that basis. As against this, there is a provision under sec. 9(2) carved out on the basis of Article 22(5) of the Constitution which provides that nothing in sub-sec. 1 shall require the authority making such order to disclose facts which it considers to be against the public interest to disclose. Therefore, it is the duty of the detaining authority to strike a balance as stated above, that in the public interest, the names and addresses of the witnesses could not be disclosed. This should not be treated as an idle formality as it affects the public interest on the one hand and the right of the detenu on the other. Looking to the respective dates of verification of statements and date of order of detention as stated in that case the detaining authority had no sufficient time to examine the possibility of exercising the power under Sec. 9(2) of the Act. This Court held that looking to that facts it is a wrong exercise of powers under Sec.9(2) of the Act which has affected the right of making effective representation under Article 22(5) of the Constitution of India and, therefore, the continued detention of the detenu is bad and illegal.

6. Keeping in mind the aforesaid legal position with regard to privilege under Sec. 9(2) of the Act, here in this case also, the statements were verified on 2.5.2000 and on the next day the order of detention came to be passed. Hence, privilege claimed by him is not properly claimed in accordance with law and, therefore, the order of detention deserves to be set aside.

7. In view of what is stated hereinabove, this writ petition is allowed. The impugned order of detention dated 3.5.2000 passed by the respondent no. 1 with respect to detenu is set aside. The detenu is ordered to be released forthwith, if he is not wanted in any custody for any criminal case or proceedings. Rule is made absolute. Direct service is permitted.

(H.H. MEHTA, J.)

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